105

Supreme Court, U.S.
FILED
OCT 24 2008
OFFICE OF THE CLERK

No. 08-325

In the
Supreme Court of the United States

MANTA MANAGEMENT CORPORATION,
Petitioner,

v.

CITY OF SAN BERNARDINO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

REPLY TO BRIEF IN OPPOSITION

ROGER JON DIAMOND
Counsel of Record
2115 MAIN STREET
SANTA MONICA, CA 90405
(310) 399-3259

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I INTRODUCTION 1

II THE CITY'S BRIEF IN OPPOSITION CONTAINS ERRORS 1

III THE ISSUES RAISED IN THE PETITION ARE WORTHY OF REVIEW 7

A. Constitutional Tort 7

B. Meaning of City of Littleton v. Z.J. Gifts ... 8

IV THERE IS NO NEED TO AWAIT REMAND .. 8

V CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Asarco Inc. v. Kadish,
490 U.S. 605, 104 L.Ed.2d 696, 109 S.Ct. 2037 (1989) 9

City of Knoxville v. Entertainment Resources,
166 S.W.3d 650 (Tenn. 2005), cert. denied, 545 U.S. 1061, 163 L.Ed.2d 627, 126 S.Ct. 798 (2005) 6

City of Littleton v. Z.J. Gifts,
541 U.S. 774 (2004) 8

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975) 10, 11

District of Columbia Court of Appeals v. Feldman,
460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed. 206 (1983) 8

Fort Wayne Books, Inc. v. Indiana,
489 U.S. 46, 103 L.Ed.2d 34, 109 S.Ct. 916 (1989) 9, 10, 11

Malley v. Briggs,
475 U.S. 335 (1986) 6

Manta Management Corp. v. City of San Bernardino,
43 Cal.4th 400 (2008) 1, 2, 3, 4, 9

Miami Herald Publishing Co. v. Tornillo,
418 U.S. 241, 41 L.Ed.2d 730, 94 S.Ct. 2831
(1974) 10

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,
414 U.S. 156, 38 L.Ed.2d 379, 94 S.Ct. 407
(1973) 9

Pennsylvania v. Ritchie,
480 U.S. 39, 94 L.Ed.2d 40, 107 S.Ct. 989
(1987) 9

Rooker v. Fidelity Trust Co.,
263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362
(1923) 8

CONSTITUTION

U.S. Const. amend. I 3, 4, 8, 11

STATUTES

28 U.S.C. Section 1257 10

42 U.S.C. Section 1983 ..... 4, 5, 8

OTHER AUTHORITIES

Clerk's Transcript, in People v. Manta Management Corporation, California Court of Appeal No. E019635 2

I INTRODUCTION

On September 8, 2008 Petitioner Manta Management Corporation (hereinafter "Manta") filed a Petition for Writ of Certiorari with this Court to review a final judgment of the California Supreme Court. The City filed its Brief in Opposition on October 10, 2008. Pursuant to Supreme Court Rule 15(b), Manta herewith submits this Reply. While there is no deadline for this Reply Manta understands the clerk may distribute the Petition and Brief in Opposition on or after October 20, 2008, to the Court, and will distribute this Reply to the Court when it is filed. See Rule 15(5).

II THE CITY'S BRIEF IN OPPOSITION CONTAINS ERRORS

It is unfortunate that the City makes false statements in its Brief in Opposition to Petition for Writ of Certiorari. This is typical of the conduct of the City throughout this litigation. As the California Supreme Court recognized, the fight between the City and Manta began with the City providing ". . . misinformation regarding the number of sites and acres within the city on which adult entertainment businesses could operate. . . ." (Emphasis added) Manta Management Corp. v. City of San Bernardino, 43 Cal.4th 400, 413 (2008); Pet. For. Cert., Appendix C, page 23a.

Now, near the end of this almost 15 year fight for constitutional rights the City in the first page of its "Statement of Facts and of the Case" (set forth at page 4, second paragraph) falsely states,

> ". . . The TRO and preliminary injunction did not prevent operation; they simply required Manta's employees to keep their clothing on pending a trial."

To the contrary the TRO prohibited Manta " . . . from presenting any live adult entertainment . . . including . . . erotic touching of human . . . buttocks . . . or female breasts . . . ." See Clerk's Transcript, page 68, lines 20-25, in People v. Manta Management Corporation, California Court of Appeal No. E019635, which the California Supreme Court judicially noticed. See Manta Management Corp. v. City of San Bernardino, 43 Cal.4th 400, 403, footnote 2; Pet. For Cert., Appendix C, page 6a. The preliminary injunction included the same language. See Clerk's Transcript, p. 622.

The California Supreme Court characterized the preliminary injunction: The " . . . preliminary injunction . . . ordered Manta to cease adult cabaret performances at the club. . . ." Id. At 404; Pet. For Cert, Appendix C, page 8a.

The City's misstatement at the beginning of its Brief in Opposition was deliberate. It was designed to minimize the constitutional violation and subtly influence this Court to believe the case is not worthy of review.

At page 5 of its Brief in Opposition, the City improperly attempts to relitigate the underlying case. Then, the City mischaracterizes the Writ of Supersedeas issued by the California Court of Appeal. The City says the Writ of Supersedeas " . . . only

required it to keep its "dancers" clothed pending the resolution of the appeal. . . . ." The California Supreme Court did not limit the description of the writ. The California Supreme Court stated,

> ". . . [T]he Court of Appeal issued a writ of supersedeas (the stay) that prevented Manta from 'operating as an adult business' pending resolution of the appeal. . . ." Id. at 405; Pet. For Cert., Appendix C, page 9a.

The City's discussion of "Liability and Damages Proceedings" states

> ". . . Manta's case therefore rested on the premise that the act of requesting a preliminary injunction, and the act of requesting a writ of supersedeas pending appeal, violated the First Amendment."

The City's misstatement above as to Manta's case misled the California Supreme Court into misstating the issue. The California Supreme Court stated:

> ". . . The issue before us is whether the City's act of seeking an injunction to enforce the ordinance dealing with the location of adult businesses and its subsequent act of filing a petition for writ of supersedeas to obtain a stay pending appeal 'caused' the harm suffered by Manta to the extent that the City is liable for damages Manta incurred during the 53 months the injunction and stay were in place." Id. at 407; Pet. For Cert., Appendix C, page 13a.

After misstating the issue based upon the City's mischaracterization of Manta's argument, the California Supreme Court correctly quoted from the California Court of Appeal's decision, which concluded that it was

> ". . . [t]he city's act of obtaining an injunction to enforce an unconstitutional ordinance . . . [that was] an act in violation of the First Amendment within the meaning of Section 1983. . . ." Id. at 408; Pet. For Cert., Appendix C, page 13a. (Emphasis added)

After correctly paraphrasing the theory announced by the State Court of Appeal, which is that "the City's act of obtaining an injunction to enforce an unconstitutional ordinance is an act in violation of the First Amendment," the California Supreme Court inexplicably reverted to its earlier mischaracterization of the issue as to whether it was " . . . the city's seeking a preliminary injunction and a stay . . . [which] were acts in violation of the First Amendment that caused injury to Manta . . ." (Emphasis in original) Id., at 408; Pet. For. Cert., Appendix C, pp. 13a to 14a.

What all this means is that the California Court of Appeal properly recognized that the basis for liability was the obtaining of the injunction, not the seeking of the injunction. Obviously the act of the City in seeking an injunction causes no damage. It is, rather, the successful obtaining of the preliminary injunction which causes the damage. That injunction could not have been obtained in the absence of the unconstitutional ordinance which the City itself adopted.

Throughout this litigation the City kept hammering on the theme that it could not be held liable for simply seeking an injunction. Of course that is true. What Manta complained about in this case and which was the basis of liability imposed by the trial court and sustained by the Court of Appeal was the successful obtaining of the preliminary injunction and the successful obtaining of the Writ of Supersedeas fr m the Court of Appeal.

The California Court of Appeal below recognized the difference between simply seeking an injunction on the one hand and obtaining the injunction on the other. The Court of Appeal clearly understood that the basis of liability here was not the fact that the City sought the preliminary injunction and sought the Writ of Supersedeas but that the City was successful. The California Court of Appeal stated in the opinion below for that Court,

> ". . . [A] section 1983 action based upon a city's act of obtaining an injunction to enforce an unconstitutional ordinance is also not subject to the rule that damages may be recovered only in an action on a bond."

The only other state appellate courts to deal with this issue is the Tennessee Supreme Court and the Tennessee Court of Appeals. The City argues in this Court that the Tennessee decisions are not contrary to the California Supreme Court because the Tennessee courts did not deal with the precise issue decided by the California Supreme Court. This is false. The Tennessee appellate courts clearly ruled that the wrongfully issued injunction to enforce an

unconstitutional ordinance gave rise to liability on the part of the city. While it is true the Tennessee courts did not deal with the issue in detail the decision does stand unless this Court disapproves it. The City has cited no case for the contrary proposition.

The City does not state that the decision of the California Supreme Court below is consistent with the decision of this Court in Malley v. Briggs, 475 U.S. 335 (1986). Rather, the City simply argues that the statement by this Court in footnote 7 in Malley v. Briggs, was merely dictum. Manta concedes that this Court's statement in Malley v. Briggs was dictum. However, certiorari certainly may be granted to clarify dictum by this Court since lower courts do afford dictum from this Court great weight even though technically it is not binding on the lower courts.

The City misses the point in its discussion of the issue before this Court. Manta has not argued that there is liability automatically whenever a city seeks and obtains a preliminary injunction that is later dissolved. The more narrow issue here, and the issue that was before the Tennessee appellate courts in City of Knoxville v. Entertainment Resources, 166 S.W.3d 650 (Tenn. 2005), cert. denied, 545 U.S. 1061, 163 L.Ed.2d 627, 126 S.Ct. 798 (2005) is whether a city should be held liable under the Civil Rights Act when it enforces its own unconstitutional ordinance by obtaining a preliminary injunction later dissolved upon a determination that the ordinance is unconstitutional. We would have a different case if the City of San Bernardino simply went to court to enforce a state statute. Arguably the City should not be held responsible if a statute adopted by the State

Legislature and signed by the Governor turns out to be unconstitutional. This case is limited to an unconstitutional City ordinance adopted by the very City that obtains a preliminary injunction to enforce it. Under these circumstances there is liability, or should be liability, under the Civil Rights Act. The City must be held accountable for the adoption of its own unconstitutional ordinance. It has no one else to blame.

Arguably a trial court judge might be justified in issuing a preliminary injunction when a state statute is being enforced. However, when a city seeks enforcement of its own ordinance the city is impliedly guaranteeing the validity of that ordinance. The city is standing behind that ordinance. If it is later held to be invalid the city should have to pay. Why should the constitutional right of the person preliminarily enjoined be damaged without redress.

III THE ISSUES RAISED IN THE PETITION ARE WORTHY OF REVIEW

A. Constitutional Tort

Petitioner submits it was the act of obtaining the preliminary injunction which caused the damage, not the act of seeking the preliminary injunction. The Court of Appeal understood that concept. See Pet. For Cert., Appendix D, page 32a. Tort law is concerned with foreseeability. It was certainly foreseeable that if the City sought a preliminary injunction to enforce its ordinance a court would grant such a request.

B. Meaning of City of Littleton v. Z.J. Gifts

This Court stated in City of Littleton v. Z.J. Gifts, 541 U.S. 774 (2004) that 42 U.S.C. Section 1983 provides "federal remedies" as "an additional safety valve" if the state courts are not responsive to the special needs of adult businesses in First Amendment zoning cases. Clearly the California courts were not helpful to Manta. So, the question is what did this Court mean when it referred to federal remedies under 42 U.S.C. Section 1983.

Obviously, Manta could not have gone immediately to the federal court for injunctive relief. It did go originally, but was thrown out on preemption grounds. Under this Court's decisions in Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed. 206 (1983). Manta contends it did have the right under 42 U.S.C. Section 1983 to seek damages under the federal statute in the state court. If not, this Court should clarify its decision in Z.J. Gifts.

IV THERE IS NO NEED TO AWAIT REMAND

In its summary of argument at page 2 of its Brief in Opposition the City falsely states that the Supreme Court of California "remanded for a trial on whether the courts were materially misled. . . ." Brief in Opposition, page 2.

In contrast to the City's mischaracterization of what the State Supreme Court did, the Supreme Court

did not remand the matter for trial. Rather, as the Supreme Court stated in its last paragraph,

> " . . . [W]e . . . remand the cause to that court [Court of Appeal] with directions to remand it in turn to the Superior Court with directions to conduct proceedings consistent with the views expressed herein." See Manta Management Corp. v. City of San Bernardino, 43 Cal.4th 400, 414 (2008); Pet. For Cert., Appendix C, p. 24a.

There is a difference between a "proceeding" on the one hand and a "trial" on the other. There is not to be a new trial in this case. The issue to be decided on remand is whether there was a material misrepresentation made by the City and the City has already acknowledged that it made a misrepresentation. The only issue was whether it was material.

Based upon this limited remand the City argues this Court should not take the case at this stage of the proceedings.

This Court has frequently rejected such an attempt to subvert this Court's certiorari jurisdiction. Among the cases dealing with this issue are:

1. Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 103 L.Ed.2d 34, 109 S.Ct. 916 (1989);

2. Pennsylvania v. Ritchie, 480 U.S. 39, 94 L.Ed.2d 40, 107 S.Ct. 989 (1987);

3. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975);

4. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 41 L.Ed.2d 730, 94 S.Ct. 2831 (1974); and

5. North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 38 L.Ed.2d 379, 94 S.Ct. 407 (1973).

6. Asarco Inc. v. Kadish, 490 U.S. 605, 104 L.Ed.2d 696, 109 S.Ct. 2037 (1989).

Manta respectfully submits that these cases clearly support the proposition that this Honorable Court does have jurisdiction to entertain Manta's Petition for Writ of Certiorari.

Fort Wayne Books, Inc. v. Indiana, supra, appears to be directly on point. The case involved the seizure prior to trial of the property of three adult bookstores. This was done pursuant to a pre trial seizure order. No trial date was set and the bookstores sought to vacate the prior seizure order. The trial court refused relief but did certify the constitutional issues to the Indiana Court of Appeals, which ruled the seizures to be in violation of the U.S. Constitution. The Indiana Supreme Court reversed the Indiana Court of Appeals. The case was to be then submitted to the Indiana trial court. The adult bookstores sought review in this Court, which addressed its own jurisdiction under Title 28, United States Code, Section 1257. The specific jurisdictional issue was whether this Court had jurisdiction to resolve the merits of the case given the fact that there had yet to be a trial and that the

matter had been remanded to the Indiana trial court for trial.

This Court in the Fort Wayne Books case referred to its earlier decision in Cox Broadcasting Corp. v. Cohn, supra, where this Court in Cox stated,

> "[W]here the federal issue has been finally decided in the state courts with further proceedings pending in which the parties seeking review here might prevail on the merits on non federal grounds, thus rendering unnecessary review of the federal issue by this court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . in the state court proceeding still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the court has entertained and decided the federal issue, which itself has been finally determined by the state courts for the purposes of the state litigation." Id., 489 U.S. at 55.

Here review by this Court and the reinstatement by this Court of the decision of the California Court of Appeal would obviate the need for further proceedings. It would also resolve an important federal issue involving the First Amendment and the interpretation of the Federal Civil Rights Act.

This is an extremely important case. Contrary to the position of the City, there is a conflict between the decision of the California Supreme Court and the

decision of the Tennessee Supreme Court. Review now will obviate the need for further proceedings in the Superior Court below. The issue to be resolved on remand is irrelevant. The California Court of Appeal below did not need to remand it. Reversal by this Court of the California Supreme Court's decision and reinstatement of the California Court of Appeal's decision will bring finality to this litigation.

V CONCLUSION

For the foregoing reasons and for the reasons expressed in the Petition for Writ of Certiorari, Petitioner Manta Management Corporation respectfully asks this Honorable Court to grant the Writ of Certiorari to review the judgment below.

Respectfully submitted,

ROGER JON DIAMOND
Counsel of Record
2115 Main Street
Santa Monica, CA 90405
Phone: 310/399-3259
Attorney for Petitioner